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May 5, 1999

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OFFICE OF THE SECRETARY

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OUR FILE NO.
25101.74560

Magalie Roman Salas, Secretary
Federal Communications Commission
Portals II, Room TWA-325
445 Twelfth Street, SW
Washington, D.C. 20554

Re: Notice of Ex Parte Presentation

Clarification of the Commission's Rules on Interconnection Between LECs and Paging Carriers, CCB/CPD 97-24

Implementation of the Local Compensation Provisions of the Telecommunications Act of 1996, First Report and Order, CC Docket Nos. 96-86. 95-185

Formal Complaints of Metrocall, Inc. against Various LECs, File Nos. E-98-14-18

Formal Complaint of USA Mobile Communications, Inc. II against CenturyTel of Ohio, Inc., File No. E-98-38

Formal Complaint of TSR Paging, Inc. against US WEST Communications, inc., File No. E-98-10

Dear Ms. Salas:

On May 3, 1999, Mark Stachiw and Carl Northrop met on behalf of AirTouch Paging with Ari Fitzgerald of Chairman Kennard's office, and Dorothy Attwood,Yog Varma, William Bailey, Katherine Schroder, Rich Lerner, and Ed Krachmer of the Common Carrier Bureau to discuss the petitions for reconsideration pending in the captioned proceeding and recent developments in state arbitration proceedings respecting LEC/paging interconnection.

No. of Copies rec'd 0+10
List A B C D E

Written materials reflecting AirTouch's position on the substantive issues were used during the meetings. A copy of those materials is attached hereto.

Pursuant to section 1.1206(b) of the Commission's rules, two copies of this letter and attachments are hereby filed with the Secretary's office. Copies of this letter and attachments also are being delivered by messenger today to the FCC staff persons present in the referenced meetings.

Kindly refer any questions in connection with this matter to the undersigned.

Very truly yours,

Carl W. Northrop

Carl W. Northrop
of PAUL, HASTINGS, JANOFSKY & WALKER LLP

cc: Ari Fitzgerald
Yog Varma
William Bailey
Katherine Schroder
Dorothy Attwood
Rich Lerner
Ed Krachmer

REFLECTIONS OF AIRTOUCH PAGING ON THE INTERCONNECTION NEGOTIATION AND ARBITRATION PROCESS

May 3-4, 1999

AirTouch Has Been Deeply Involved in Interconnection Issues

- AirTouch has negotiated or is negotiating with every RBOC (Ameritech, Bell Atlantic, BellSouth, SBC and US West) and major independent LEC (e.g. GTE, Sprint, SNET)
  - To date, agreements have been reached with only one major LEC (GTE) and that agreement only was reached after an FCC complaint was filed
- AirTouch has been forced to file court actions against two RBOCs to enforce its rights under Section 252(i)
  - Bellsouth refused to give AirTouch the same agreement it executed with NexTel
  - PacBell refused to give AirTouch the California PUC-approved agreement it entered into with Cook Telecom
  - In each case, AirTouch was seeking to adopt the approved agreement in toto (i.e. no effort made to "pick and choose")
- AirTouch is currently seeking to exercise 252(i) rights in two other instances but the going is very slow
  - Ameritech - PageNet
  - Bell Atlantic - PageNet

- AirTouch found it necessary to file complaints against two LECs who refused to provision new or modified facilities pending the resolution of billing disputes
  - FCC complaint against GTE (settled)
  - District Court complaint against US West (pending; interim provisioning agreement reached)
- AirTouch Has Been Forced to File Arbitration Petitions Against US West
  - Arbitration proceedings have been conducted and decisions rendered in Colorado and Washington
  - All remaining states are still unresolved as US West declined to agree to have the arbitrated agreement in one of the arbitration states apply elsewhere

AirTouch's Experience Reveals a Number of Structural Problems with the Current Negotiations/Arbitration Procedures

- LECs have virtually no incentive to reach voluntary agreements
- LECs are exploiting the process to litigate and relitigate basic entitlement issues in multiple forums
- The expenses associated with the current process are prohibitive, even for the largest paging carriers
- There is a high risk of inconsistent decisions; inconsistencies are exploited by the LECs

LECs Have Inadequate Incentives

- The absence of an interim rate (either a symmetrical rate or a default rate) means that LECs benefit from delay
- Unless the final arbitrated or negotiated rate is given effect as of the date of the negotiation request, LECs are incented to stonewall, delay and force arbitration
- The failure of the FCC to sanction non-compliance allows LECs to stonewall with impunity

The LECs Refuse to Accept Valid FCC Decisions

- The basic entitlement of paging carriers to terminate compensation has been litigated *ad nauseum* even though none of the LEC's direct and collateral attacks have succeeded
  - The FCC, the 8th Circuit, multiple state commissions and reviewing courts all have been asked to address this issue
  - The time and expense devoted to the basic entitlement issue is exorbitant, and the commitment distracts attention from other important issues (e.g. the rate)
- The issue continues to be pending in multiple forums
  - The reconsideration proceeding, the Metzger letter challenges, the 9th Circuit and various appeals to come in state proceedings all raise the issue

The Expenses are Prohibitive

- The excessive commitment of time, money and resources to has interfered with other critical matters
  - AirTouch estimates that 2,000 to 4,000 manhours of AirTouch personnel have been expended
  - AirTouch has been forced to engage federal regulatory counsel and multiple state regulatory litigation attorneys (8, and counting)
  - Each court proceeding cost, on average, $100K+
  - Each arbitration has cost, on average, $100K+, just to the point of initial decisions; this becomes a losing proposition financially even when the paging carrier prevails
- Paging carriers have no commercial alternative
  - Other CMRS carriers can accept the symmetrical rate and avoid litigation
  - Paging carriers can only litigate - - which exacerbates the situation

AirTouch's Experience in Washington and Colorado Reveals Flaws in the Paradigm

- Virtually identical cases can record result in dramatically different decisions
  - In Colorado and Washington, the same attorneys, the same witnesses and the same direct case presentations produced highly inconsistent results (see the chart on the next page)
- LECs exploit these inconsistencies to avoid compliance
- The willingness or ability of state commissions to implement the federal mandate is suspect

What Can the FCC do to Improve the Situation?

- Use complaint proceedings to sanction LECs for noncompliance with interconnection rulings, thereby imposing a cost on non-compliance
- Rule that paging carriers are entitled to interim relief at the same rates as other CMRS carriers, thereby eliminating the LEC incentive to delay (e.g. set a default rate, a symmetrical rate or rule that adjudicated rates date back to the date of request).
  - AirTouch's cost studies show that its costs are at least equal to the current CMRS terminating compensation rates
- Preempt state commissions from adjudicating basic entitlement issues, thereby avoiding the multiplicity of proceedings
- Issue guidelines governing Section 252(i) requests (as advocated by AirTouch in the ISP proceeding)
- Reject the challenges to the Metzger letter, and affirm paging entitlements on reconsideration

These actions, in tandem, will send a strong message to the LECs that the Commission will not tolerate the LEC's intransigence any longer

COMPARISON OF THE WASHINTON STATE AND COLORADO DECISIONS

ISSUE	WASHINGTON ARBITRATION	COLORADO ARBITRATION
ARE PAGING CARRIERS ENTITLED TO "RECIPROCAL" COMPENSATION?	YES	YES, BASED ON FCC DECISIONS, BUT THE PUC DISAGREES THAT THIS IS THE PROPER RESULT
ARE PAGING CARRIERS REQUIRED TO PAY THE LEC FOR THE LEC FACILITIES USED TO DELIVER LEC-ORIGINATED TRAFFIC (E.G., THE METZGER LETTER)?	NO	NO, BASED UPON FCC DECISIONS, BUT THE PUC BELIEVES THIS IS THE WRONG RESULT – PAGING CARRIERS ARE THE COST CAUSERS, NOT THE LEC
WHERE SHOULD THE PARTIES INTERCONNECT?	ANYWHERE WITHIN THE LATA AND AIRTOUCH DOES NOT HAVE TO PAY FOR THE LEC FACILITY TO GET THE TRAFFIC TO THE POI SO LONG AS IT IS WITHIN 60 MILES	WITHIN THE LOCAL CALLING AREA OF THE LEC SWITCH
WHERE SHOULD THE RATING POINTS BE LOCATED?	ANYWHERE WITHIN THE LATA	WITHIN THE LOCAL CALLING AREA OF THE LEC SWITCH
SHOULD AIRTOUCH BE ALLOWED TO SEPARATE RATING AND ROUTING?	YES – VERY EFFICIENT	NO
WHAT OBJECTIVE GRADE OF SERVICE APPLIES TO FACILITIES?	P01	P01
IS AIRTOUCH'S PAGING SWITCH THE FUNCTIONAL EQUIVALENT OF A SWITCH?	YES	YES, BASED UPON FCC DECISIONS, BUT THE PUC BELIEVES THIS IS WRONG
IS AIRTOUCH ENTITLED TO BE PAID FOR ITS NETWORK BEYOND THE FIRST SWITCH?	NO	NO
WHAT RECIPROCAL COMPENSATION RATE SHOULD BE PAID?	LEC END-OFFICE RATE USED AS A PROXY UNTIL COSTS ARE PROVEN	$0 (AIRTOUCH FAILED TO MEET THE BURDEN OF PROVING ITS COSTS; NO INTERIM RATE SET AND NO MECHANISM PROVIDED FOR REVISING THE COST STUDY)
WHAT PERCENTAGE OF TRAFFIC IS SUBJECT TO COMPENSATION (E.G., LOCAL, NON –TRANSITING TRAFFIC)?	80%	0% (AIRTOUCH FAILED TO MEET ITS BURDEN OF PROVING HOW MUCH TRAFFIC SENT TO IT BY US WEST WAS NON-COMPENSABLE)
WHAT IS THE EFFECTIVE DATE OF THE AGREEMENT?	FOR RELIEF FROM FACILITIES CHARGES, THE DATE OF REQUEST; FOR TERMINATING COMPENSATION, THE DATE THE AGREEMENT IS APPROVED	THE DATE THE AGREEMENT IS APPROVED (BUT IN EFFECT NO COMPENSATION IS RECEIVED UNDER THE PRIOR RULINGS)
DOES AIRTOUCH HAVE 252(I) RIGHTS DURING THE TERM OF THE AGREEMENT?	YES	YES, BASED UPON FCC DECISIONS, BUT THE PUC THINKS THIS RESULT IS WRONG

SERVICE DATE
APR 28 1999

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Petition for Arbitration of an Interconnection Agreement Between AIRTOUCH PAGING, and U S WEST COMMUNICATIONS, INC. Pursuant to 47 USC Section 252.	)	DOCKET NO. UT-990300 ARBITRATOR' S REPORT AND DECISION

I. MEMORANDUM

A. Procedural History.

On July 28, 1998, AirTouch Paging (AirTouch), requested to negotiate an interconnection agreement (Agreement) with U S WEST Communications, Inc. (U S WEST). On January 4, 1999, ELI, timely filed a Petition for Arbitration with the Washington Utilities and Transportation Commission ("Commission")[1] pursuant to 47 USC § 252(b)(1) of the Telecommunications Act of 1996, Public Law No. 104-104, 101 Stat. 56, *codified at* 47 U.S.C. § 151 et seq. (1996) (Telecom Act). The matter was designated Docket No. UT-990300.

The Commission entered an Order on Arbitration Procedure and Protective Order on January 13, 1999, and appointed an Arbitrator on January 21, 1999. U S WEST filed its response with the Commission on January 29, 1999.

On February 4, 1999, a prehearing conference was held to establish a procedural schedule. AirTouch's cost study and related testimony was filed on February 19, 1999. Both parties filed non-cost study related testimony on February 24, 1999. U S WEST filed cost study related reply testimony on March 8, 1999. Discovery was conducted, including the depositions of prospective witnesses.

Hearings were conducted on March 17 and 18, 1999, at the Commission's offices in Olympia, WA. Post-hearing briefs were filed on April 2, 1999.

B. Presentation of Issues.

The parties presented twelve unresolved issues falling into three broad categories, 1) basic entitlement to compensation issues, 2) economic issues, and

[1] In this decision, the Washington Utilities and Transportation Commission is referred to as the Commission. The Federal Communications Commission is referred to as the FCC.

3) system configuration issues. Several issues designated by the parties required precursory determinations which are addressed as separate issues in the instant Arbitrator's Report and Decision (Report). The parties submitted an unresolved issues matrix which presented the issues sequentially according to corresponding sections in the Agreement. The Report follows a different sequence in presenting decisions.

1. What Constitutes "Local" and Non-Local" Traffic?
2. Is U S West Required to Pay for Transport Facilities to Deliver Local Traffic Originating on its Network to AirTouch?
3. Where Should the Parties Interconnect?
4. Where Should Rating Points Be Located?
5. Should Rating and Routing Points Be Separated?
6. What Is the Appropriate Grade of Service for Trunk Groups to Be Provided by U S West, Should AirTouch Co-determine All Aspects and Elements of Paging Connection Service Facilities?
7. Does Reciprocal Compensation Require Reciprocal Services?
8. Is AirTouch's Paging Terminal the Functional Equivalent of a Switch?
9. Is AirTouch Entitled to Reciprocal Compensation for Networking Costs Beyond its Paging Terminal?
10. What Reciprocal Compensation Rate Should Be Paid?
11. What Percentage of Traffic Is Subject to Reciprocal Compensation?
12. What is the effective Date of the Agreement?
13. Does Section 252(I) of the Telecom Act Allow AirTouch to "Pick-and-Choose" During the Term of the Agreement?

C. Resolution of Disputes and Contract Language Issue.

Prior to the start of the hearing the Arbitrator ordered that "final offer" arbitration would control dispute resolution on all issues except the determination of AirTouch's costs of terminating local traffic. In preparing the arbitration report in this matter, the Arbitrator was required to choose between the parties' last proposals as to each unresolved issue. The Arbitrator retained discretion to independently resolve

issues if it was determined that neither parties' proposal was consistent with the requirements of state or federal law or regulations on an issue-by-issue basis.

As a general matter, this decision is limited to the disputed issues presented for arbitration. 47 U.S.C. § 252(b)(4). Each decision of the Arbitrator is subject to and qualified by the discussion of the issue. The Arbitrator reserves the discretion to either adopt or disregard proposed contract language in making decisions. However, adoption of one party's position generally implies that the parties should use that party's contract language incorporating the advocated position in preparing a final agreement. Contract language adopted remains subject to Commission approval. 47 U.S.C. § 252(e).

This Report is issued in compliance with the procedural requirements of the Telecom Act, and it resolves all issues which were submitted to the Commission for arbitration by the parties. The parties are directed to engage in good faith negotiations and resolve any precursory issues not expressly addressed, consistent with the Arbitrator's decisions. If the parties are unable to submit a complete interconnection agreement due to an unresolved issue they shall notify the Commission in writing prior to the time for filing the agreement. At the conclusion of this Report, the Arbitrator addresses the approval procedure to be followed in furtherance of the issuance of a Commission order approving an interconnection agreement between the parties.

D. The Eighth Circuit Order and the FCC Rules

On August 8, 1996, the FCC issued its First Report and Order (Local Competition Order), including Appendix B - Final Rules (FCC Rules).[2] On October 15, 1996, the U. S. Court of Appeals, Eighth Circuit stayed operation of the FCC Rules relating to pricing and the "pick and choose" provisions.[3]

On July 18, 1997, the Eighth Circuit issued an order vacating several of the FCC Rules. On October 14, 1997, the Court entered an order on rehearing vacating additional FCC Rules. The Eighth Circuit decisions were thereafter appealed to the U. S. Supreme Court. On January 25, 1999, the Supreme Court issued a decision holding that the FCC Rules, with the exception of §51.319, are consistent with the Telecom Act.[4]

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[2] *In the Matter of the Implementation of the Local Competition Rules of the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order (August 8, 1996), Appendix B- Final Rules.

[3] *Iowa Utilities Board et al. v. FCC*, No. 96-3321, Order Granting Stay Pending Judicial Review (8th Cir. Oct. 15, 1996).

[4] *AT&T Corp. v. Iowa Utilities Board*, 119 S. Ct. 721 (1999).

E. Standards for Arbitration

The Telecommunications Act states that in resolving by arbitration any open issues and imposing conditions upon the parties to the agreement, the state commission is to: (1) ensure that the resolution and conditions meet the requirements of Section 251, including the regulations prescribed by the FCC under Section 251; (2) establish rates for interconnection services, or network elements according to Section 252(d); and (3) provide a schedule for implementation of the terms and conditions by the parties to the agreement. 47 U.S.C. § 252(c).

F. AirTouch's Challenge to Confidential Information

During the course of the hearing AirTouch challenged the confidential designation of a portion of Exhibit C-27 relating to the obligation of U S WEST to pay termination compensation for traffic originating on and transiting its network.[5] U S WEST stated that it remains opposed to consideration of challenges of portions of confidential documents and that the memorandum, in its entirety, is an internal strategy and planning document. U S WEST argued that the document was clearly marked confidential and made clear that it did not oppose the admissibility of the document.

Similar challenges were raised and upheld in MCImetro Access Transmission Service, Inc., v. U S WEST.[6] U S WEST has petitioned for judicial review of that Commission decision.[7] The Commission found that it must employ the statutory test in RCW 80.04.095 to determine whether challenged confidential information is entitled to protection. Records, or portions of records, constitute valuable commercial information (and must be afforded confidential protection) if their disclosure would result in private loss, including an unfair competitive disadvantage. Both the Protective Order and WAC 480-09-015 state that the burden of proof shall be on the party asserting confidentiality to show that challenged information is properly classified. Thus, the burden is on U S WEST to prove that the excerpts from Exhibit C-27 are entitled to protection.

The Arbitrator ruled from the bench finding that disclosure of the challenged portions of Exhibit C-27 would not result in either loss or unfair competitive disadvantage to U S WEST. The Arbitrator ordered that the information continue to be protected for ten days thereafter to enable U S WEST to seek

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[5] Exhibit C-27, page 5-14, third paragraph in the text block, and page 5-15, Figure 1.

[6] MCImetro Access Transmission Services, Inc., v. U S WEST Communications, Inc., *Eleventh Supplemental Order Denying U S WEST's Petition for Reconsideration*, Docket No. UT-971063 (March 25, 1999).

[7] U S WEST Communications, Inc., v. Washington Utilities and Transportation Commission, *Petition for Review*, Superior Court of the State of Washington for King County, No. 99-2-09202-3SEA (received by the Commission, April 16, 1999).

Commission or judicial review of the determination, including a stay of the decision's effect pending further review.

II. RESOLUTION OF DISPUTED ISSUES

1. What Constitutes "Local" and Non-Local" Traffic? (Contract Section 3.16)

A. AirTouch Position

AirTouch states that its proposal defining "Local Traffic" conforms exactly to the definition established by the FCC in 47 C.F.R. § 51.701(b)(2). AirTouch also proposes a definition of "Non-Local Traffic":

> "Non-Local Traffic" means telecommunications traffic that originates in one Major Trading Area (MTA)[4] and terminates in another MTA (i.e., interMTA traffic).[5]

B. U S WEST Position

U S WEST states that the real issue is not what should be defined as "local," but what traffic is subject to reciprocal compensation. U S WEST contends that AirTouch does not perform the function of call termination as defined in the Telecom Act; therefore, reciprocal compensation is not payable. Alternatively, U S WEST states that if terminating compensation is to be paid for traffic originating on U S WEST's network, such compensation should not be paid for traffic that is not local. U S WEST proposes the following definition of "Non-Local Traffic":

> "Non-Local Traffic" is traffic that is interMTA, interLATA, or other traffic subject to switched access charges rather than reciprocal compensation.

C. Discussion

47 C.F.R. § 51.701 distinguishes between Local Exchange Carrier (LEC) to Commercial Mobile Radio Service (CMRS) providers (including paging providers) and LEC-to-non-CMRS providers. Regarding CMRS providers, FCC Rule

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[4] The parties agree that a MTA is a geographic area established in Rand McNally's Commercial Atlas and Marketing Guide, as modified and used by the FCC in defining CMRS license boundaries for CMRS providers for purposes of Sections 251 and 252 of the Telecom Act.

[5] In comparison, Regional Bell Operating Companies (RBOCs) are restricted from providing interLocal Access and Transport Area (LATA) pursuant to section 271 of the Telecom Act. Other Incumbent Local Exchange Carriers (ILECs), such as GTE Northwest, are not so restricted.

51.701(b)(2) states that "local telecommunications traffic" means telecommunications traffic that, at the beginning of the call, originates and terminates within the same MTA.

The competing definitions for Non-Local Traffic proposed by the parties differ over compensation for other traffic subject to switched access charges, specifically interLATA traffic. The FCC's rule implicitly acknowledges that CMRS subscribers are mobile and may not be located in the same LATA (much less the same local service area)[18] as the calling party. 47 C.F.R. § 51.701(d) states that for purposes of Subpart H of the FCC's rules, termination includes delivery of such traffic to the called party's premises. Insofar as CMRS subscribers are mobile, the called party's premises can be anywhere within the MTA. Accordingly, a LEC may not impose switched access charges on CMRS traffic originating on its network on the basis that a message is ultimately delivered to the called party outside the LATA, so long as the called party is within the MTA. Stated another way, the termination of traffic by a CMRS provider and the subsequent delivery of a message to a paging service subscriber located interLATA, but also intraMTA, does not constitute one-call for purposes of determining whether switched access charges apply.

However, the location of the called party's premises is not determinative of where local traffic terminates. This Report finds that AirTouch's paging terminal is functionally equivalent to an end-office switch where local traffic terminates and that termination facilities do not extend beyond the paging terminal. Therefore, a call originating in one LATA and terminating in another is subject to switched access charges.

D. Decision

The definitions of "Local Traffic" and "Non-Local Traffic" require separate decisions. The language proposed by AirTouch defining "Local Traffic" is adopted as partial resolution of this issue. The position of U S WEST is adopted regarding the concept of "Non-Local Traffic;" however, its proposed language is not.

2. Is U S West Required to Pay for Transport Facilities to Deliver Local Traffic Originating on its Network to AirTouch?

A. AirTouch's Position

AirTouch argues that the prohibition on LEC charges on other telecommunications carriers stated in Section 51.703(b) of the FCC rules applies both to "traffic" and "facilities." This issue was addressed by the FCC in the Metzger

[18] A local calling area in Washington State is the geographic area defined by the extended area service (EAS) boundaries as determined by the Commission and defined in U S WEST's tariffs within which LEC customers may complete a landline call without incurring toll charges.

Letter.[11] The issue was raised by a LEC which sought clarification on whether the prohibition on charges to paging carriers for local LEC-originated traffic extended to both usage-sensitive traffic charges and non-usage sensitive facility charges. The FCC's Common Carrier Bureau placed this request for clarification on public notice and solicited comments from all interested parties.[12]

AirTouch states that an extensive record was compiled as representatives of all affected classes of carriers, including U S WEST, commented on the pertinent CMRS-LEC interconnection rulings, the text of the applicable rules, governing precedents, and the underlying policy considerations. Ultimately, the Bureau found there to be no basis for permitting a LEC to assess charges to a paging carrier to recover costs for dedicated facilities used to deliver local traffic originating on its network on the paging service provider. Thus, AirTouch argues that the FCC confirmed the plain language of the *Local Competition Order* that local LEC-originated traffic must be delivered to paging service providers without charge.

B. U S WEST Position

U S WEST argues that the Metzger Letter is not binding law and its conclusion is wrong. According to U S WEST, the Metzger letter was neither subject to Administrative Procedure Act notice and comment procedures nor the result of a formal adjudication, and is merely a letter interpretation by a single FCC staff member. U S WEST claims that the Metzger Letter requested comments by an FCC press release and not by publication in the Federal Register (Ex. 1, Appendix Ex. J at 1 n. 1), and the absence of publication in the Federal Register or the Code of Federal Regulations is an indication that the letter interpretation is neither a substantive rule nor binding.

U S WEST states that the Metzger Letter does not purport to be other than an interim interpretation of FCC rules. U S WEST argues that Mr. Metzger offers his opinion as a staff member concluding that the issue is "subject to pending petitions for reconsideration" of the rules and "will be considered by the Commission further based on the record developed in response to those petitions." Ex. 1, Appendix Ex. J at 3. Thus, by its terms the interpretation is not intended to be definitive or final. Rather, the letter is in the nature of an advisory opinion or interpretative guidance offered to specific members of the regulated industry to apprise them on an interim basis of the current thinking on the issue.

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[11] Letter from Common Carrier Bureau Chief A. Richard Metzger, Jr. to Keith Davis, *et al*, DA-97-2726, CCB/CPB No. 97-24, released December 30, 1997. Exhibit J to Appendix A of AirTouch's Petition.

[12] *Public Notice, Pleading Cycle Established for Comments on Request for Clarification of the Commission's Rules Regarding Interconnection Between LECs and Paging Carriers*, (CCB/CPD 97-24, DA-97-1071), released May 22, 1997.

Furthermore, U S WEST argues that the Metzger interpretation is inconsistent with the Telecom Act because it overlooks or ignores a LEC's duty to interconnect and its right to compensation for providing facilities arising under § 251(c)(2).

C. Discussion

At the time the Metzger Letter was issued, its author, A. Richard Metzger, Jr., was the Chief of the Common Carrier Bureau of the FCC. The rules and regulations of the FCC delegate broad authority to the Common Carrier Bureau Chief to "perform all functions of the Bureau." 47 C.F.R. § 0.291. Those Bureau functions expressly include the development, recommendation and administration of policies and programs for the regulation of the services, facilities and practices of subject common carriers. 47 C.F.R. § 0.91. The FCC's rules also empower the Bureau to act for the full FCC under delegated authority on a broad range of matters pertaining to the regulation and licensing of communications common carriers (47 C.F.R. § 0.91(a)), and to advise the public and industry groups on wireline common carrier regulation and related matters. 47 C.F.R. § 0.91(c). The Metzger Letter was issued after notice and extensive comment by interested parties including U S WEST and was a lawful exercise of authority delegated by the FCC to the Common Carrier Bureau Chief.

Section 1.102(b) of the FCC's rules expressly provides that "Non-hearing or interlocutory actions taken pursuant to delegated authority shall, unless otherwise ordered by the designated authority, be effective upon release of the document containing the full text of such action . . .." Not only did U S WEST file comments in response to public notice, but it joined other parties in filing Applications for Review of the Metzger conclusion. Malone, Exhibit T-22 at 5. The filing of a petition for reconsideration or application for review of such an action does not automatically stay the effectiveness of the action; rather the Commission must exercise its discretion for a stay to issue. 47 C.F.R. §§ 1.102(b)(2) and (b)(3). In the case of the Metzger Letter, a stay was not issued and the FCC has taken no further action.

U S WEST's argument that the Metzger Letter is not binding until further action is taken by the FCC is difficult to accept. The notion that FCC Commissioners are susceptible to inaction in the face of an erroneous Common Carrier Bureau decision of this import is suspect. However, assuming that the Metzger Letter is not binding on a procedural basis, it provides valuable guidance until such time as final action is undertaken. The rationale set forth in the Metzger Letter is persuasive.

U S WEST's argument that the Metzger conclusion conflicts § 251(c)(2) of the Telecom Act is based upon its erroneous premise that AirTouch is the cost causer for traffic originating on U S WEST's network. To borrow the lawn-watering

analogy in U S WEST's brief. U S WEST customers water their neighbor's lawn because it increases the value of their own property, even though AirTouch bears the costs of landscaping and maintenance. If U S WEST did not provide the hose, its customers would not receive a benefit. U S WEST is not required to provide local service to its customers without compensation, but it also is not entitled to recover that expense from AirTouch.

The Loretto v. Teleprompter case[13] cited by U S WEST is not on point. In Loretto, New York law compelled a landlord to grant cable companies access to the landlord's building for cable installation, and dictated that the cable company need only pay a nominal fee to the landlord. In the instant case, it is U S WEST customers that want access to the AirTouch network. U S WEST asserts that receipt of a benefit should not be confused with the incurring of a cost, but it is unwilling to apply the same standard to itself that it seeks to impose on others. The fact that paging subscribers want to be informed when U S WEST customers desire to personally communicate with them does not alter the essential fact that U S WEST customers originate the call.

U S WEST argues that call origination does not identify cost causation in this context. But however "muddled" the application of cost causation principles to paging provider traffic may appear, the consequences of rejecting call origination as the basis for cost causation is even murkier.

D. Decision

Under this combination of circumstances, U S WEST's claims regarding the Metzger Letter are rejected, and AirTouch's basic entitlement to relief from certain facility charges as specified in the Metzger Letter are affirmed.

3. Where Should the Parties Interconnect? (Contract Section 2.6.4)

A. AirTouch Position

Section 51.703(b) of the FCC rules provides that "[a] LEC may not assess charges on any other telecommunications carrier for local telecommunications traffic that originates on the LEC's network". AirTouch argues that based upon that section and section 51.702(b)(2) (defining local telecommunications traffic), the obligation of a LEC to bear the costs of facilities used to deliver traffic to a CMRS carrier extends beyond the boundary of an EAS/ Local Calling Area on the wireline network. The statutory scheme contemplates that AirTouch be entitled to specify the points at which it seeks interconnection, and U S WEST is obligated to comply as long as it is "technically feasible" to satisfy the request.

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[13] Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).

AirTouch is presently interconnected with U S WEST in Washington; however, it does not have a point of connection (POC) in each EAS/local calling area nor does it interconnect to each local and toll tandem. The FCC's rules provide that:

> Previous successful interconnection at a particular point in a network, using particular facilities, constitutes substantial evidence that interconnection is technically feasible at that point, or at substantially similar points, in networks employing substantially similar facilities.

47 C.F.R. Section 51.305(c). AirTouch states that it is unreasonable for U S WEST to require AirTouch to establish additional undesired points of connection when the existing arrangement is working. AirTouch argues that U S WEST seeks to minimize its costs to deliver traffic originating on its network by imposing additional costs on AirTouch to establish unnecessary facilities.

AirTouch's Last Best Offer proposes three interconnection arrangements. First of all, AirTouch seeks to grandfather the existing arrangements and define them as one form of efficient interconnection. AirTouch argues that U S WEST must bear the cost to deliver traffic originating on its network (including dedicated facilities) to any technically feasible POC within the MTA. Secondly, AirTouch proposes to establish a "Billing Demarcation Point" at the closer of the LATA boundary or 60 miles from the U S WEST end-office or tandem where the facility is connected. The Billing Demarcation Point also is characterized as a "virtual POC." Lastly, subject to the first two arrangements, AirTouch may designate additional POCs within the MTA and receive traffic from the U S WEST end-office or tandem where the facility is connected.

B. U S WEST Position

U S WEST contends that AirTouch should be required to establish more than one point of connection within each MTA or wireless local calling area. Rather than establishing points of connection based upon MTAs, AirTouch should be required to establish points of connection based upon the EAS/Local Calling Areas established by the Commission. This means, first, that AirTouch should be required to provide a physical point of presence within each LATA. Section 271 of the Telecom Act prohibits U S WEST and its affiliates from providing interLATA service, except as provided in Section 271, and there is no exception for "intraMTA" traffic.

Second, AirTouch must establish a point of connection within each EAS/Local Calling Area where it has NXXs (the first three numbers dialed when making a local call) assigned and within each EAS/Local Calling Area of the end-office housing the DID Outpulsing[14] numbers associated with AirTouch's Type 1

[14] DID Outpulsing is a U S WEST service.

Service. U S WEST states that existing points of connection are acceptable, but only if U S WEST does not have to backhaul traffic without compensation. Thus, if AirTouch uses foreign exchange facilities it must pay for those costs.

When AirTouch's terminal is located outside of the EAS/Local Calling Area, the connection in the EAS/Local Calling area may be established through a "hub/mux" arrangement. U S WEST will make available to AirTouch both private line services and hub/mux arrangements that will give it a presence in each local calling area, but AirTouch should be required to pay for any such facilities.

C. Discussion

AirTouch's proposal that a virtual point of connection be established to serve as a billing demarcation point violates section 271 of the Telecom Act. The AirTouch proposal is no different than if U S WEST were to propose such an arrangement with another carrier to hand off interLATA traffic as part of a joint marketing plan. Furthermore, there is no basis upon which to impose the cost of facilities for third party interLATA transport. AirTouch must establish at least one POC in each LATA for the termination of intraMTA traffic. Section 51.701(b)(2) defining local telecommunications traffic between a LEC and a CMRS provider does not dictate the designation of POCs. On this basis alone, AirTouch's proposal is contrary to federal law and regulations and must be rejected.

U S WEST takes liberty with semantics when it refers to its obligation to provide transport facilities necessary to terminate traffic originating on its network without charge to paging providers as "backhauling traffic without compensation." U S WEST may not impose its facilities costs to interconnect and deliver local traffic originating on its network upon a terminating paging provider. U S WEST's proposal that AirTouch unconditionally must pay for dedicated transport for facilities that extend beyond the EAS/Local calling Area is contrary to federal law and regulations and must also be rejected.

Neither proposal by the parties is acceptable; therefore, the Commission exercises independent judgment to resolve this disputed issue.

In Washington, T-1 facilities connect AirTouch's Seattle switch to U S WEST end-offices in Seattle and to U S WEST's local tandem in Seattle, toll tandem in Seattle, and main office in Seattle. Analog trunks connect AirTouch's Seattle switch to U S WEST end-offices in Bellingham, Port Angeles, Tacoma, Bremerton, and Auburn. Analog trunks also connect AirTouch's Yakima switch to U S WEST's end-offices in Yakima, Pasco, and Spokane. Bidmon, Exhibit T-2 at 18. Type-1 interconnection connects a CMRS network to a LEC end-office, and Type-2 interconnection connects a CMRS network to a LEC tandem. Bidmon, Exhibit T-2 at 11. Current interconnection arrangements between AirTouch and U S WEST are

provided by both tariff and a Type-2 interconnection agreement. Bidmon, Exhibit T-2 at 20. AirTouch's existing POCs are located at AirTouch switches.

Although both proposals by the parties are contrary to law, in part, both proposals have merit, in part. When interconnected LECs exchange traffic both have an incentive to designate POCs where expenses incurred are in parity, often at a mid-span meet point. In the instant case the parties have failed to accomplish that task and the job now falls to the Commission. The FCC has not been forthcoming with national guidelines. While paging providers migrate towards two-way communications in order to compete with expanding cellular and PCS products and services, they remain, in large part, recipients, and not originators, of local telecommunications traffic.

In order to balance the respective interests and risks between the parties, it is necessary to find trade-offs between networking costs that will promote fair and efficient interconnection. It is to be expected that a plan devised by the Commission will not be perfect, but will be reasonable.

D. Decision

In order to obtain blocks of local numbers (which paging providers so highly value), blocks of 100 numbers will be provided by U S WEST to AirTouch as available from the NXX codes assigned to a U S WEST end-office. AirTouch and U S WEST have agreed to continue a pre-Telecom Act arrangement whereby AirTouch orders and receives DID Outpulsing and DID Number Block Activation services until such time as U S WEST seeks Commission approval of TELRIC-based rates. U S WEST must continue to provide services on that basis during the term of the Agreement.

AirTouch may designate a POC anywhere within the LATA; however a billing demarcation point arrangement, as proposed by AirTouch, shall be established at sixty airline miles between the interconnection point on U S WEST's network and the intraLATA POC designated by AirTouch.

Alternatively, AirTouch may obtain assignments of NXX codes in full or partial blocks of 10,000 through the North American Numbering Plan Administrator (NANPA), but Paging Connection Service shall not extend beyond the boundaries of the geographic area of U S WEST's Wire Center/End-office/Tandem serving AirTouch's POC. U S WEST must pay for interconnection facilities between its Wire Center/End-office/Tandem and a POC within that boundary or else a billing demarcation arrangement should be implemented. AirTouch must balance the cumulative costs of DID services as it increases subscribers against the cost of establishing additional POCs and paying for the transport facilities between the POC and its paging terminal.

The present network design and resulting interconnection arrangements are technically feasible and efficient. AirTouch may designate new or additional POCs where it wants to receive traffic from U S WEST. The parties must cooperate and work together to maintain efficient interconnection during the term of the Agreement. Any related complaint shall be resolved according to dispute resolution procedures in the Agreement.

4. Where Should Rating Points Be Located? (Contract provision 3.23)

A. AirTouch Position

The routing point is the point through which traffic, in the interconnection sense, is routed to the AirTouch network. Bidmon, T-2 at 76. AirTouch proposes that the routing point must be in the same LATA as the associated NPA-NXX (area code plus the first three digits of a telephone number).

B. U S WEST Position

U S WEST proposes that the routing point must be in the same EAS/Local Calling Area as the associated rating point. Furthermore, AirTouch must designate one routing point within the same EAS/Local Calling Area as the associated rating point for each whole or partial NXX code assigned. U S WEST also proposes that AirTouch must establish a POC within the serving area of the U S WEST end-office where assigned DID numbers reside.

C. Discussion

U S WEST's proposal that AirTouch be required to establish a POC within the serving area of the U S WEST end-office where assigned DID numbers reside is contrary to the decision that AirTouch only be required to establish a POC in each LATA.

D. Decision

AirTouch's proposed language is adopted as part of this decision.

5. Should Rating and Routing Points Be Separated? (Contract Provision 5.4)

A. AirTouch Position

A rating center, also referred to as a rating point, is a geographic point on the wireline network which is used by the originating carrier to determine how to bill the call to its customer who originates the call. Bidmon, T-2 at 76. The routing point is the point through which traffic, in the interconnection sense, is routed to the AirTouch network. In areas where a number of rating points subtend the same

tandem, AirTouch argues that it is more efficient to transport traffic via a common trunk group to the AirTouch paging terminal, rather than arranging separate facilities coming from each rating center (historically termed foreign exchange (FX) facilities). AirTouch also proposes that it be allowed to assign less than whole NPA-NXX codes to each Rate Center when it becomes technically and economically feasible to do so.

B. U S WEST Position

U S WEST opposes the separation of rating and routing outside the EAS/Local Calling Area. However, rate centers are designated by state commissions and filed in the state tariffs reflected in the Local Exchange Routing Guide (LERG). Toll free calling areas for landline customers correspond with rate center structures within U S WEST. Each rate center has a designated LATA tandem and possibly a local tandem, each with subtending offices. U S WEST proposes that AirTouch should select an end-office as a rate center for each NXX code that is within the serving area of the local and toll tandem to which AirTouch interconnects. AirTouch also should assign whole NPA-NXX codes to each rate center.

C. Discussion

U S WEST's proposal is premised upon the presumption that AirTouch is responsible for paying charges for facilities to transport local traffic originating on U S WEST's network; more trunks equal more revenue. However, in the context of U S WEST paying for the costs of transporting that traffic, it makes sense that U S WEST utilize shared transport facilities, as opposed to dedicated facilities, to transport telecommunications traffic to the POC.

D. Decision

AirTouch's proposed language is adopted as part of this decision.

6. What is the Appropriate Grade of Service for Trunk Groups to Be Provided by U S West, Should AirTouch Co-determine All Aspects and Elements of Paging Connection Service Facilities? (Contract Provision 2.6.2)

A. AirTouch Position

AirTouch's proposes that Paging Connection Service facilities shall be engineered to the objective grade of service standard specific for intraLATA and Exchange Access trunk groups in BellCore Special Report SR-TAP-000191, "Trunk Traffic Engineering Concepts and Applications," Issue 2, December, 1989, p. 2-7, as the same may be modified from time to time by BellCore, or to the same grade of service U S WEST provides to its affiliates, whichever is better. AirTouch witness Bidmon states that the current BellCore standard that U S WEST must provide is a P.01 grade of service. Bidmon , Ex. T-2 at 71. "P.01" represents the percentage of blocking that

occurs on a network, resulting in a fast busy signal to the calling party. Mr. Bidmon states that P.01 is the industry standard grade of service for paging interconnection as documented by BellCore.

AirTouch also relies upon network performance standards applicable to U S WEST established by WAC 480-120-515(2). AirTouch argues that it is not clear what grade of service would be engineered under U S WEST's proposed contract language which could lead to further disputes.

AirTouch requests that the parties co-determine all aspects and elements of Paging Connection Service facilities, including the reconfiguration of trunk groups. AirTouch describes Paging Connection Service facilities as shared use facilities because they will be used to carry both U S WEST traffic and third party traffic to the AirTouch network. While the parties disagree on the percentage of traffic that is properly deemed transit traffic, both sides agree that AirTouch will pay for the portion of the interconnection trunks used to carry third party traffic. AirTouch argues that it has a direct financial and engineering interest in assuring that interconnection facilities properly sized so that calls from both U S WEST and other carriers are properly delivered to AirTouch without undue blocking.

B. U S WEST Position

U S WEST asserts that AirTouch's proposed language constitutes a demand for P.01 grade service at all times, requiring U S WEST to overbuild its facilities specifically for AirTouch to ensure that trunk blocking never exceeded one percent during the busiest hour of calling. U S WEST states that it does not provision trunks in this manner to other carriers, and no other interconnection agreement to which U S WEST is a party contains such a provision. Accordingly, AirTouch's demand for P.01 performance grade of service at all times is a request for superior quality interconnection that U S WEST is not required to provide.

U S WEST states that it engineers its trunk groups according to industry standards and generally meets the P.01 grade of service that AirTouch demands and applies the same engineering standards to all similar types of trunk groups and similarly situated carriers. U S WEST cannot and does not commit to any carrier to provide this grade of service at all times because there are numerous factors beyond U S WEST's control, including AirTouch's own ordering behavior, that affects trunk blocking. Furthermore, consistent with U S WEST's position and practices, Washington law only requires U S WEST to engineer its trunks to the P.01 standard, not guarantee performance at that level at all times.

U S WEST proposed contract language refers to negotiated terms in the Agreement regarding joint planning activities for the purpose of forecasting networking requirements; however, U S WEST reserves all decision making authority regarding the provision of Paging Connection Service facilities, including the reconfiguration of trunk groups.

C. Discussion

In Iowa Utils. Bd. v. FCC, 120 F.3d 753 (8th Cir. 1997), the Eighth Circuit held that the Act requires ILECs to provide requesting carriers with access to their "existing" networks only. Id. at 813. ILECs are not required to provide CLECs with "superior" quality interconnection or "superior" quality access to unbundled network elements. Id. at 812-13. Instead, with respect to interconnection, ILECs are only required to provide interconnection that is "equal in quality" to what the ILEC provides itself, its affiliates or other carriers. Id. No party appealed this holding and, accordingly, the Supreme Court's decision in AT&T Corp. v. Iowa Utils. Bd., 119 S. Ct. 721 (1999), has no effect on this aspect of the Eighth Circuit decision.

It is not apparent from the record or arguments that AirTouch demands any greater grade of service than that which is provided for in BellCore Special Report SR-TAP-000191 or WAC 480-120-515(2). Both of these references provide that a P.01 objective for engineering a trunk group does not necessarily mean 1% overall blocking. The service quality measurements stated in WAC 480-120-515(2) are the minimum acceptable quality of service under normal operating conditions. Furthermore, U S WEST acknowledges that the BellCore Special Report states engineering guidelines regarding the grades of service that U S WEST provides to CMRS carriers. Exhibit 18.

Insofar as AirTouch relies upon the same source document and WAC section as U S WEST to determine applicable service quality measurements, there should be no dispute between the parties regarding contract language on this sub-issue.

Regarding the second sub-issue raised by the parties, AirTouch's interest in assuring that interconnection facilities are properly sized to avoid undue call blocking is an interest shared by all telecommunications carriers and users. The Commission adopted WAC 480-120-515 providing for network performance standards in recognition of that widespread interest. The fact that U S WEST may be required to share facilities for the transport and termination of calls does not militate in favor of an additional requirement that all aspects and elements of those facilities be subject to mutual agreement between the parties. AirTouch's proposed language is an necessary means to accomplish the same objective as WAC 480-120-515.

D. Decision

U S WEST should provide Paging Connection Service facilities engineered to be consistent with the Eighth Circuit court decision, BellCore Special Report SR-TAP-000191, and WAC 480-120-515. U S WEST's proposed language regarding the determination of all aspects and elements of Paging Connection Service facilities, including the reconfiguration of trunk groups, should be incorporated into the Agreement.

7. Does Reciprocal Compensation Require Reciprocal Services?

A. AirTouch Position

One of U S WEST's objections to the payment of reciprocal compensation is that AirTouch is a one-way service provider and does not originate traffic; therefore, a compensation arrangement which requires the originating carrier to compensate the terminating carrier cannot be deemed "reciprocal" within the meaning of the Telecom Act. AirTouch contends that this argument has been duly considered and rejected by the FCC,[15] the Eighth Circuit, multiple state commissions, and the Commission itself.[16] The FCC expressly ruled in its Local Competition Order, at ¶ 34, that "LECs are obligated . . . to enter into reciprocal compensation agreements with CMRS providers, including paging providers. . .." (Also see ¶1008). AirTouch argues that there is no legal basis to conclude that traffic must flow in both directions for the compensation obligation to apply.

B. U S WEST Position

AirTouch's claim to reciprocal compensation is based on section 251(b)(5) of the Telecom Act, which imposes upon local exchange carriers "[t]he duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications." U S WEST relies upon a dictionary definition of the term "reciprocal," and argues that the term means the mutual exchange of traffic. Thus, § 251(b)(5) does not give rise to a statutory duty to compensate carriers that do not perform "reciprocal" functions. Insofar as AirTouch's customers are physically unable to originate traffic that U S WEST could transport and terminate because of the inherent limitations of the AirTouch network, U S WEST argues that there is no possibility of a two-way exchange of traffic, and § 251(b)(5) does not apply.

U S WEST argues that unless AirTouch is required to pay for facilities to deliver traffic originating on U S WEST's network, there is nothing that would prevent it from over-ordering with impunity and expanding its system indefinitely by shifting costs to U S WEST and charging a lower price to its customers.

C. Discussion

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15 FCC Local Competition Order, ¶1088.

16 Washington AWS Arbitrator's Report and Decision at 31-34; Washington AWS First Supplemental Order at 2-3.